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Supreme Court, U.S.
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No. 88-1878

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JAMES SAFFLE, WARDEN,
OKLAHOMA STATE PENITENTIARY,
GARY MAYNARD, DIRECTOR
OKLAHOMA DEPARTMENT OF
CORRECTIONS,
ROBERT H. HENRY,
ATTORNEY GENERAL OF
OKLAHOMA,

PETITIONERS,

vs.

CHARLES WILLIAM DAVIS,
Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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June, 1989
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QUESTION PRESENTED

Can a state seek certiorari on a federal question where the outcome cannot be altered because there is an independent federal constitutional ground requiring relief.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

JAMES SAFFLE, Warden, Oklahoma State Penitentiary, GARY MAYNARD, Director, Oklahoma Dept. of Corrections, and ROBERT H. HENRY, Attorney General of Oklahoma,	)	
Petitioners	)	88-1878
vs.	)	
CHARLES WILLIAM DAVIS,	)	
Respondent.	)	

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI[1]

STATEMENT

Respondent, CHARLES DAVIS, was sentenced to die for the shooting of his brother-in-law and brother-in-law's friend. The jury, while rejecting the aggravating circumstance, that there existed a probability the Defendant would commit criminal acts of violence which would constitute a continuing threat to society, found Respondent knowingly created a great risk of death to more than one person, the murders especially heinous, atrocious or cruel, the Respondent had previously been convicted of a felony involving the use or threat of violence to the person and sentenced Respondent to death.

The evidence in the first stage of the trial showed Respondent shot and killed Robert Wayne Jones, his brother-in-law, and Dennis McLaughlin, after Mr. Jones, Respondent's wife, another brother and McLaughlin had come to his home in Oklahoma

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[1]The unanimous opinion in the United States Court of Appeals for the 10th Circuit sets out more fully the factual and procedural history in this case. See Petitioners's Appendix A at 1-9. References in parentheses in this section are to the transcript of the trial, TR or to the original record or supplemental record in state court, OR.

City at 5:30 o'clock in the morning to remove her possessions. (Tr. 340, 348). Respondent wounded both his wife and her other brother at the same time. (Tr. 348). The shooting occurred after all of Respondent's wife's belongings were withdrawn from his house and a dispute arose, at which time the people in the house were shot. The jury rejected Respondent's claim of self defense.

During the second stage of the trial proceedings, the State of Oklahoma introduced into evidence a certified copy of the judgment and sentence of Respondent's 1942 conviction for murder. (Tr. 835). Thereafter, the evidence admitted in the first stage of the trial was incorporated into the second stage (Tr. 837) and the state rested.

Respondent called numerous witnesses to testify to his good work record and dependability and love for his wife. (Tr. 841).

Respondent testified in his own behalf that he attended school for only eight (8) years and he had not had any fights for over twenty-eight (28) years. (Tr. 861). He stated he had not been in trouble since 1942 when he was convicted of murder in Missouri. (Tr. 861). A tape recording was introduced into evidence of a statement Respondent had recorded for his wife just prior to their marriage about their age differences and other problems they had to face and his love for her.

Respondent's jury was instructed that: "The term heinous, as that term is used in these instructions, means extremely wicked or shockingly evil, and that atrocious means outrageously wicked and vile: and cruel means designed to inflict a high degree of pain, utter indifference to, or enjoyment of the suffering of other; pitiless." (O.R. 135). Respondent's counsel attempted to get the court to give an instruction that guided the jury's discretion on this circumstance to include some type of

unnecessary torturous activity, but that instruction was refused. (Supp. O.R. 14).

Additionally, in the penalty stage, the jury was given the following instruction "You should not allow sympathy, sentiment or prejudice to affect you in reaching your decision. You should avoid any influence of passion, prejudice or any other arbitrary factor when imposing sentence." (O.R. 70). The prosecutor, in his arguments to the jury reiterated the comments regarding sympathy

> "You're instructed in the instructions that you should not let sympathy affect your judgment and that is a kind of a hard instruction. Think about that. That you are put in a jury box and they say: 'Don't let sympathy affect your judgment.' Why do they do that? Well, because you see over the door there there are Scales of Justice and you are a part and become, really the Scales of Justice and so you must weigh these decisions, and you weigh them impartially and without sympathy. You must do that, so what does that mean? Well, you have heard us speak for a moment of the statutory aggravating circumstances. Because it is the law which compels, and I believe we properly understood and read in the facts of this case which compel you to return the death penalty."

(Tr. 896).

Additionally, the prosecutor noted

> "Well, I know you will consider the matters carefully. I know that you will consider them as you are, as a part of this court. As an arm of the law and an arm of justice. And that is what must be done. You must consider without sympathy. You must consider it on the evidence, and when you have found these four aggravating circumstances and consider what there is in mitigation, if anything, then, you see maybe from the beginning none of us have really had any choice."

(Tr. 908).

REASONS FOR DENYING THE WRIT

The United States Court of Appeals for the Tenth Circuit remanded this case to the District Court with directions to enter judgment denying the Writ of Habeas Corpus and enjoining the execution of Respondent under the invalid death sentence. The judgment was without prejudice to further proceedings by the

state for redetermination of sentence. See PET.APP A at 54. The decision of the Court of Appeals rests upon two independent federal constitutional grounds and the relief Respondent seeks would amount only to an advisory opinion and would have no effect upon the judgment of the Court of Appeals.[2]

Petitioner seeks certiorari on only one of two independent grounds from which the Circuit Court granted relief. Acceptance of certiorari by this Court would be a severe waste of the Court's time and resources. The state is asking for an advisory opinion on only one of the issues in which the Circuit Court enjoined the infliction of the death penalty. As a general rule, federal courts will not give advisory opinions. Wright, Miller and Cooper, Federal Practice and Procedure, 2d Vol. 13, p. 293 (1986). This Court, by granting certiorari, would be looking at issuing a mere advisory opinion. This Court, in another context dealing with separation of powers concerns, has stated,

> "The implicit policies embodied in Article III and not history alone, imposed the rule against advisory opinions on federal courts ..."

Flast v. Cohen, 392 U.S. 83, 96-97 (1968).

The use of certiorari to answer unnecessary questions which would not change the result of enjoining the death sentence in the instant case, wastes the scarce resources of this Court.

The United States Court of Appeals for the Fifth Circuit in Pressly v. Wainwright, 540 F.2d 818, 821, [5th Cir. 1976] cert.

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[2]The Court of Appeals decisions enjoining the execution of the death sentence was based on the Circuit's conclusion that the aggravating circumstance that the murders were especially heinous, atrocious or cruel was unconstitutionally vague and over broad, as enunciated by this court in Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853 (1988) and Godfrey v. Georgia, 446 U.S. 420, 428, as well as the fact that the sympathy instruction directed the jury to remain unaffected by sympathy, creating a risk that the jury discounted Respondent's evidence in reaching its sentencing conclusion. The Circuit concluding that the instruction was over broad and not cured by the instructions as a whole.

denied 430 U.S. 987 (1977) has noted regarding Federal Court jurisdiction,

> "A prerequisite of this Court's jurisdiction is the existence of a case or a controversy which is justiciable. U.S. Const. art. III, § 2; Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-41, 57 S.Ct. 461, 81 L.Ed. 617 (1937). For this reason, federal courts refuse to consider a case or a controversy of a non-concrete or hypothetical nature. "It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. (Emphasis added). Aetna Life Ins. Co., supra at 241, 57 S.Ct. 461. Under the facts extant in Prisoner's case, the "if" voussior binding the State's argument together is hypothetical: a substitute counsel agreed to take Prisoner's case and was substituted. The result is an argument based on a nonexistent factual context. Where a concrete case exists, this Court will not and may not resolve a hypothetical case."

Additionally, in Environmental Defense Fund v. Alexander, 614 F.2d. 474, 480, [5th Cir. 1980] cert. denied, 449 U.S. 919, the Fifth Circuit, in concluding that the defense of latches had been established, noted "... the court's musings about how the case might have been decided on the merits if timely filed and if we would grant relief would surely be the rendering of an advisory opinion in violation of the constitutional stricture. See U.S. Const. art. III § 2; Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240-41, 57 S.Ct. 461, 464, 81 L.Ed. 617, 621 (1937)."

This Court has already granted certiorari in Saffle v. Parks, Number 88, 1264 wherein an instruction similar to the instruction given in Respondent's case will be looked at by this Court. In light of the obvious error in the failure to limit the aggravating circumstance especially heinous, atrocious and cruel as addressed by this Court in Maynard v. Cartwright, 486 U.S.

_____, 108 S.Ct. 1853 (1988)* this Court should deny certiorari.

CONCLUSION

For the reason stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT
*COUNSEL OF RECORD

*Oklahoma law is unclear as to the effect of these constitutional errors on resentencing. See Pet. App. A at 52, 53. The Circuit Court opinion left it to the state court to address in the first instance. See also, Maynard v. Cartwright, 486 U.S. _____, 106 S.Ct. 1853, 1860 (1989).

CERTIFICATE OF SERVICE

I hereby certify that I am attorney of record for Respondent Charles William Davis, and that I served the annexed Brief for the Respondent in Opposition to Certiorari on Petitioners by delivering a copy to office of the Attorney General of the State of Oklahoma, addressed as follows:

Susan Dickerson
Assistant Attorney General
Room 112
State Capitol Building
Oklahoma City, Oklahoma 73105

All parties required to be served have been served.

Done this 16th day of June, 1989.

Robert A Ravitz

ROBERT A. RAVITZ

88-1878

AFFIDAVIT OF MAILING

I, ROBERT A. RAVITZ, counsel of record for respondent, Charles William Davis, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of June, 1989, within the time permitted for filing, I caused to be deposited in the United States mail, with first-class postage prepaid, one original and nine copies of the foregoing Brief for the Respondent in Opposition to Certiorari, addressed to the Clerk of the Supreme Court of the United States.

Robert A Ravitz
ROBERT A. RAVITZ

Subscribed and sworn to before me, a Notary Public at Oklahoma County, Oklahoma this 16th day of June, 1989.

[signature]
NOTARY PUBLIC

My Commission Expires:

July 1989
(SEAL)

88-1878

CERTIFICATE OF SERVICE

I hereby certify that I am attorney of record for Respondent Charles William Davis, and that I served the above and foregoing Motion for Leave to Proceed in Forma Pauperis for the Respondent by delivering a copy to the Office of the Attorney General of the State of Oklahoma, addressed as follows:

Susan Dickerson
Assistant Attorney General
Room 112
State Capitol Building
Oklahoma City, Oklahoma 73105

All parties required to be served have been served. Done this 16th day of June, 1989.

Robert A Ravitz
ROBERT A. RAVITZ

AFFIDAVIT OF MAILING

I, ROBERT A. RAVITZ, counsel of record for respondent, Charles William Davis, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of June, 1989, within the time permitted for filing, I caused to be deposited in the United States mail, with first-class postage prepaid, one original and nine copies of the foregoing Motion for Leave to Proceed in Forma Pauperis, addressed to the Clerk of the Supreme Court of the United States.

Robert A Ravitz
ROBERT A. RAVITZ

Subscribed and sworn to before me, a Notary Public at Oklahoma County, Oklahoma this 16th day of June, 1989.

Donna L Williams
NOTARY PUBLIC

My Commission Expires:

1 July 1991
(SEAL)